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1. Upon a bill to correct a settled account for specified errors, such errors only can be corrected as arose from fraud or mistake; and the plaintiff cannot surcharge and falsify, as to an item of the account assented to at the settlement with a full knowledge of the facts. *Compton* v *Greer et al.* 93
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1. The obligee of a bond in suit having assigned it verbally as a security to a creditor, and given him the custody of it, with authority to conduct the suit, and the obligor, with notice of the assignment, having paid the debt to the obligee, and taken a release from him—in equity the interest of the assignee will be protected, and the obligor enjoined from pleading the release to the action at law. *Ellis* v *Amason*, 273

2. Notice of the assignment of a bond should be direct, in order to charge the obligor with a wrongful payment of it; but notice may be proved otherwise than by the assignee. *Ibid.* 279

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CREDITORS.

1. Where two creditors obtained judgments against their common debtor, at the same time, and the clerk wrongfully issued an execution to one of them, whereby the other obtained a priority, in the absence of a fraudulent combination between the clerk and the creditor thus preferred, a Court of Equity will not deprive the latter of the advantage he has thus gained. *Bank of Newbern* v *Jones*, 284
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3. If a debtor can, at law, give one creditor a priority, a Court of Equity will not restrain him from doing so; because the favored creditor gets nothing but what he has a right to receive. *Ibid.* 289
4. Where two creditors are equally entitled to executions, and the clerk refuses to issue in favor of one of them, it is not a case of preference. *Ibid.* 289
5. And *it seems* that the creditor has no redress against the other, unless perhaps, where the latter induced the clerk not to issue the execution of the first. *Ibid.* 290
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8. Between creditors, whose equities are equal, he who has the legal title prevails. But where he who had the legal title, had notice at the time he advanced his money, of an equity in the other, he is postponed. As where a note was endorsed to A by B, as a security, and A made subsequent advances to B, some before and some after he had notice that the maker had an equitable set-off to the note, it stands as a security to A only for advances made before notice. *Kerr* v *Cowen et al.* 356
9. It is not fraudulent for a debtor to prefer one *bona fide* creditor to another.—*Sellers* v *Bryan et al.* 362

Vide Executors and Administrators, 19,—Sureties, 1, 2, 3.

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Vide Devise, 6, 7.

DECREE.

1. Where a decree pronounced in the Superior Court does not ascertain any fact, nor declare any principle upon which it was founded, but simply dismisses the bill, on appeal, the decree is not, of course, reversed, but the cause will be re-heard upon the proofs. *Pike* v *Armstead*, 24
2. No decree can be pronounced for the plaintiff upon a bill suggesting fraud in procuring a deed and praying to have it cancelled, and for a re-conveyance, where the answer and proofs do not support the allegations, but establish a case entitling the plaintiff, upon a proper bill, to a redemption. *Brownrigg* v *Pratt*, 44
3. The plaintiff sometimes obtains a decree solely upon the admission in the answer, but the admission must have some reference to the case made by the bill, and not be entirely in avoidance of it. *Ibid.* 49
4. Relief never can be given, which is directly contrary to the prayer of the bill—as if the prayer is, that a deed be cancelled, a decree in affirmance of it will not be made. *Ibid.* 50
5. Where to a bill by the next of kin, against the executors and legatees, the latter relied upon a former decree, pronounced in a cause between the same plaintiff and the executors, commenced after the legal estate of the legatees was complete, but the executors did not plead it, nor in any way rely upon it, the de-

cree was held not to be a bar. *Redmond* v *Coffin*, 437

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Vide Practice, 5,—Surety, 5.

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Vide Pleading, 5.

DEVISE.

1. Where a testator directed his estate to be kept together until one of his five children married, or should arrive at &c. and then the one marrying or arriving at &c. to receive a share, and the residue to remain undivided for the other children, "leaving the manor plantation at a valuation of $4000 for the youngest child that may be then living, *it was held*, that the testator contemplated several divisions; that the manor plantation was to be taken by the child who was the youngest at the last division; and that in the division it was to be taken as land, and not as personalty.—*Wilder* v *Mixon*, 10
2. Where a parent is making provision by will for his children, it is presumed that he intended to extend the benefit to their issue unless the contrary expressly appears. *Cox et al.* v *Hogg*, 125
3. Where a clause of survivorship is attached to words which create a tenancy in common, it is construed as referring to some definite period. And this period is determined by the circumstances of each case. *Ibid.* 125–126
4. In preference to a general survivorship, the death of the testator is taken as the true period. *Ibid.* 126
5. In a gift by will to a child and grandchildren, "equally to be divided," each of the latter take equally with the former, unless a different intention is inferred from other parts of the will.—*Martin* v *Gould*, 305
6. Crops growing upon land, at the death of the devisor, go to the devisee. *Jones* v *Jones*, 392
7. Between the heir and the executor, the growing crop goes to the latter; but between the executor and the devisee the rule is different. *Smith* v *Barham*, 423
8. A testator having directed that the "the residue of my estate real and personal, be divided among the heirs of my brother J, the heirs of my sister N, and the heirs of my sister S, and nephew L;" it was held, the testator having recognised J, as being alive, that the word "heirs" was used as a description of legatees only, and not in its appropriate technical sense, as denoting the succession, and that the individuals of the several classes of children, were entitled *per capita*. *Ward* v *Stow*, 509

Vide Land charged with the payment of debts, 1, 2, 3. Legacy *passim*. Power 1, 2. Will.

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Vide Widow, 1, 2, 3, 4.

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Vide Executors and Administrators, 4.

EJECTMENT.

Vide Costs, 2.

EMANCIPATION.

A bequest of slaves, for the purpose of emancipation, is void, and a trust results to the next of kin. *Redmond* v *Coffin*, 440

ENTRY.

One who purchases at execution sale, land which has been entered, but not paid for, must, at his peril, complete the title, and if the entry is defective, he has no equity to claim the land of the defendant in the execution, upon a subsequent entry of it by the latter. *Nunn et al.* v *Mulholland*, 381

ESTATE FOR LIFE IN PERSONALTY.

1. A residue which is given for life, with a remainder over, must be sold by the executor, and the interest paid to the legatee for life, and the principal to him in remainder, because this is the only mode of giving both sets of legatees the enjoyment of those chattels which are perishable. *Smith* v *Barham*, 420
2. Slaves are in this State, an exception to this rule, because they are not consumed in the use, and their natural decay is supplied by their issue, which goes to those in remainder. *Ibid.* 420
3. A legatee for life is bound to keep down the interest of a debt charged upon his

legacy, and he may be compelled to contribute to its payment. But he is not bound to surrender the whole profits for the purpose of extinguishing it. *Ibid.* 425

4. The legatee for life of a specific chattel, has a right to the possession of it, and the assent of the executor to his legacy vests the title of him in remainder. *Ibid.* 426

5. When a specific chattel, which is consumed in the use, is given for life, what interest vests in the remainder-man. Qu? *Ibid.* 427

Vide Limitation of Personal Estate.

EVIDENCE.

1. The terms of a written agreement cannot be varied by parol proof, in equity more than at law, unless upon an admission by the defendant, or unless the provision sought to be established was a substantive part of the agreement, and omitted through fraud or mistake, as where an absolute bond was given to indemnify bail, and the proof was of admissions by the obligee of the intent, but nothing to show fraud or mistake, or that a condition was omitted, it was held to be single. *Howell* v *Hooks*, 258

2. A sheriff's return and deed are *prima facie* evidence of the sale and of the identity of the land sold and that conveyed; but if the presumption exists at all in favor of deeds executed by a succeeding sheriff, under the act of 1799 (*Rev. c.* 538) it fails when it appears that the successor knew nothing of the facts recited in his deed, but executed it from his confidence in the representations of the purchaser. *McPherson* v *Bussey*, 323

3. A defendant against whom no decree is prayed, and who has no disqualifying interest, may be examined by the plaintiff. *Jones* v *Bullock*, 369

4. Where a father conveyed land to a son by a deed of bargain and sale, upon a bill by other children, seeking to have the land brought into hotch-pot, parol evidence cannot be received to prove that it was in fact given as an advancement. *Wilkinson* v *Wilkinson*, 376

5. Parol evidence is not admissible, either in equity or at law, to vary the terms of a written contract. *Ibid.* 377

6. But in equity, matter of fraud, accident or surprise, may be proved by parol, to raise a trust *dehors* the deed, and affect the conscience of one claiming under it. *Ibid.* 378

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Vide Master's Report, 1, 2. Practice 4.

EXECUTION AND EXECUTION SALES.

1. As many executions, of any kind, as the plaintiff chooses, may be sued out on the same judgment—but if executed wrongfully, or irregularly, it is at his peril. *McNair* v *Ragland*, 42

2. If a *fi. fa.* and *ca. sa.* are both sued out, and there is a levy under the former, the latter cannot be executed until either a sale or due discharge of the effects. *Ibid.* 44

3. *Per* Daniel, J.—The act of 1812, (*Rev. c.* 830,) authorising the sale of trust estates by execution, applies where the trust estate of the defendant is coextensive with the legal title; not where the trustee holds for the defendant for life, with remainder to others. *Freeman et al.* v *Perry*, 245

4. A purchaser at execution sale, succeeds to all the rights of the defendant, and where the latter, before the teste of the execution, had received a deed for land, which by the fraud of a third person, had before its registration been destroyed, and the legal estate conveyed by the bargainor to that person, the purchaser is entitled to a conveyance from him.—*Morris* v *Ford*, 412

5. An unregistered deed vests in the bargainee an inchoate legal estate, which was liable to seizure under an execution, before the passage of the act subjecting equitable interests to execution sales.—*Ibid.* 416

5. Defendants need not answer immaterial allegations. Therefore where a plaintiff

alledged that an execution in favor of the defendants, being in the hands of the Sheriff, he had in satisfaction thereof, discounted with the Sheriff, a judgment which he, the plaintiff, had against him and others, an execution for which was then in the hands of the coroner, and that mutual receipts had passed between him and the sheriff; and further that the Sheriff, not paying over the money to the defendants, they had obtained a judgment therefor, upon the official bond of the Sheriff; it was held, that without the assent of the defendants to the settlement between the plaintiff and sheriff, these facts constitute no defence against the judgment in favor of the defendants, against the plaintiff; and that the defendant need not answer whether the sheriff and others against whom he had the judgment were good and able to pay the same, nor whether an execution on said judgment was in the hands of the coroner, nor whether the plaintiff gave the sheriff a receipt for the judgment, nor whether the sheriff and his sureties were able to pay the judgment on his official bond. *Collier* v *Bank of Newbern*, 525

7. Nothing but cash received by the Sheriff from the defendant in an execution, or a levy upon his property, and taking it out of his possession, can discharge the debt due the plaintiff. *Ibid.* 530

Vide Auction Sales—Creditors 1, 4, 5—Entry—Execution and Execution Sales 38, 39, 40—Mortgage 5, 6, 15.

EXECUTORS AND ADMINISTRATORS.

1. Executors are not entitled to commissions on debts due from themselves to the testator, nor upon payments to legatees.—*Arnold* v *Blackwell*, 4
2. Neither are they allowed to a dishonest executor. *Ibid.* 4
3. A division of slaves, honestly made by an executor, upon a wrong principle, may be set aside upon the bill of a legatee, who has submitted to the division in ignorance of his rights. *Speight* v *Gatling*, 9
4. The children of a second husband cannot enforce distribution from the administratrator of the first; because, if the share of the wife vested in her second husband, his administrator only can claim it; and if it survives to her, the children have no right to it. *Dameron* v *Clay et al.* 19, 20
5. An executor is not liable for *laches* in not enforcing the payment of a debt due the testator, from a co-executor who becomes insolvent after the probate of the will. *Clarke* v *Cotten et al.* 51
6. An executor may retain for necessary expenses, in addition to his commissions at the rate of 5 *per cent.* upon the receipts and disbursements. *Ibid.* 54
7. Commissioners are not allowed upon payments to legatees. *Ibid.* 55
8. An executor is not liable upon the insolvency of a co-executor, for assets which he has never had under his control. *Ibid.* 55
9. Legatees can come into equity to secure themselves against the insolvency of an executor. But it does not follow that an executor can compel an insolvent co-executor to account; and it seems that he cannot. *Ibid.* 56
10. Executors have no right to charge a specific legacy bequeathed to a co-executor, with a debt due from him to the testator. *Ibid.* 57
11. Where one, appointed an executor, purchases at the sale of the assets, before he has proved the will, and his co-executors deliver him his own note and also others, for collection, and the debtor afterwards proves the will and becomes insolvent, the co-executors are liable for the amount of his purchases and collections. *Ibid.* 57
12. But disbursements by the insolvent, in payment of the debts of the testator, made by directions of his co-executors, shall exonerate them *pro tanto*, and not be applied to a debt which he owed the testator in his life-time. *Ibid.* 58
13. Where it becomes necessary for an executor to employ an agent, the appointment of one who was nominated as co-executor, but never proved the will, is justified by the confidence reposed in him by the testator. *Ibid* 58

14. It makes no difference, that the agent may, by proving the will, place it out of the power of his co executors to call him to account. *Ibid.* 59
15. Where one executor delivers over assets to his co-executor *bona fide*, and for a purpose apparently beneficial to the estate, he is not responsible for the conduct of his co-executor. *Ibid.* 59, 60
16. An administrator who has paid debts of his intestate to a larger amount than the assets in his hands, is, in equity, substituted to the rights of the creditors, and may recover of the heir the sum thus overpaid. *Williams* v *Williams*, 69
17. But if an administrator, knowing the personal estate to be insolvent, had made such payments with the intent to make the heir his debtor, and withdraw the question of fully administered from the proper forum, he would be entitled to no relief. *Ibid.* 71
18. A Court of Equity has jurisdiction at the suit of a legatee, against the executor of an executor, who has the funds of the first testator in his hands, although there is a surviving co-executor. *Brotten* v *Bateman*, 115
19. Creditors have no redress against the executor of an executor, where there is a surviving co-executor, unless upon the ground of collusion, or of the insolvency of the survivor. *Ibid.* 117, 118
20. A payment by the executor of one of two co-executors to the survivor, will discharge the estate of the deceased executor, *pro tanto*. *Ibid.* 118
21. Legatees may in equity recover of the executor of a deceased executor, and the surviving co-executor, the funds in their hands respectively. *Ibid.* 118
22. Co-executors who jointly administer are liable for each other's acts. *Ibid.* 118
23. But upon an account of their administration, both are not jointly responsible to legatees in the first instance. He who has received the fund is primarily liable, and the other only in case of his default. *Ibid.* 119
24. The court presumes against an administrator dealing with the estate for his own benefit, or that of a co-administrator; or claiming commissions while he keeps no account. Yet under special circumstances, such dealings may be supported, and commissions allowed. *Finch* v *Ragland*, 137
25. It is not a universal rule, that an administrator who keeps no accounts shall be allowed no commissions. It is however a very general rule, and will only admit of an exception under very peculiar circumstances. *Ibid.* 141
26. An executor who keeps no accounts is chargeable with interest. *Ibid.* 142
27. The production of the intestate's notes by an admistrator is not sufficient proof of a disbursement. *Ibid.* 142
28. It is in itself a suspicious circumstance, that one administrator should confess to another a judgment for a debt claimed from the estate; and no effect will be given to it as a judgment; but the creditor, if alive, must prove the debt. But where such admistrator is dead, and many years have elapsed, so that the means of direct proof no longer exist, and all the circumstances of the case repel the presumption of fraud, the court will allow weight to the judgment as a settlement between the administrators. *Ibid.* 144
29. A judgment against an administrator is in general a sufficient voucher for him, without other proof of the debt.—But a judgment by an administrator against his co-administrator, being a nullity at law, is not allowed by a Court of Equity to have the effect of a judgment. *Ibid.* 146
30. But such judgment is evidence of a settlement between the administrators; and after the lapse of twenty years and the death of the administrator who was a creditor, the court allowed the administrator credit for the judgment, without further evidence of the debt. *Ibid.* 146
31. Although an executor cannot purchase at his own sale, yet if he does, and there is no fraud, but he pays the purchase money for the use of the estate, and his accounts are settled, and acquittances given by the legatees, without the exercise of undue influence on his part

he cannot, after the lapse of twenty-nine years, be declared a trustee for the legatees of the slaves purchased by him.—*Villines* v *Norfleet*, 167

32. A settlement of the account of an executor by commissioners appointed by the County Court, is not a bar to a future account, but it rebuts the presumption of fraud. *Ibid.* 172

33. *It seems*, that an executor who has been charged with assets in respect to a judgment which is enjoined, is entitled to relief; but whether at law or in equity. Qu? *Howell* v *Hooks*, 261

34. An administrator who has, without neglect, been compelled to pay debts of his intestate to an amount exceeding the personal estate, will be re-imbursed out of the real assets. *Sanders* v *Sanders*, 262

35. But if the payment be voluntary, whether he will be aided. Qu? *Ibid.* 262

36. The executor of a will which is of doubtful import, has a right to apply to a Court of Equity to have it construed, and its trusts declared. *Bullock* v *Bullock*, 307

37. An administrator, with the will annexed, becomes a trustee for any trusts declared in the will, as much as if he had been named executor. *Jones* v *Jones*, 387

38. Where an executor raised money and bought the slaves of his testator at execution sale, and re-paying the purchase money, conveyed them according to the terms of the will, *it was held*, DANIEL, J. dissenting, that they were liable to the claims of other creditors. *Clarke* v *Clarke*, 407

39. *Per* RUFFIN, C. J. *arguendo*.—The same objections apply to purchases made by an executor at execution sale of the assets, as to those made at his own.—*Ibid.* 410

40. By DANIEL, J. *arguendo*.—A levy vests the title to chattels in the sheriff. His sales are *prima facie* fair, and the case of *Blount* v *Davis* (2 *Dev. Rep.* 19) validate purchases of assets made by the executor at his sales. *Ibid.* 411, 412

41. Although executors who *bona fide* pay a legacy to a charity of doubtful validity are protected, yet when slaves were bequeathed to a Quaker Society, upon a trust for emancipation, and the executors confederating with the Society to defeat the claim of the next of kin, delivered the slaves to the Society, and otherwise acted *mala fide*, they, in default of payment by the Society, were held responsible for their value and hire, and also for interest thereon. *Redmond* v *Coffin*, 452

42. No decree can be made against an executor, unless assets are admitted by him, or found upon a reference: and where he is made a defendant by *scire facias*, after establishing the right of the plaintiff, the proper step is to direct an enquiry as to assets. *Mitchell* v *Robards*, 478

43. Executors charged with the management of legacies to infants, are entitled to commissions upon the profits—but they take them *as executors*, to be divided according to their several degrees of labor; and upon the death of one who had possession of the fund, the survivor is not entitled to another commission.—*Perry* v *Maxwell*, 506

Vide Account, 2, 3,—Interest, 3,—Jurisdiction, 1,—Legacy, 48,—Master's Report, 2,—Reference to the Clerk and Master, 1,—Residue and Residuary Clause, 2,—Surety, 4,—Vendor and Purchaser, 6.

EXCHANGE.

Where A sold land to B, for $5,100, with a permission to make a payment of $1,500 by a conveyance of two tracts of land in Tennessee, which should be of the value of three dollars per acre according to the locator's valuation; upon a bill by A, claiming the $1,500 in cash, it was held, to be an executory agreement for an exchange of land, and that the default of B, in making the conveyance, and the want of a locator's valuation were matters of compensation.—*Littlejohn* v *Jelar*, 303

FEME COVERT.

In suits by married women, a *prochein amy* is necessary, not only to secure the costs,

but when her husband is a defendant, to interpose a suitable adviser; and this rule is not dispensed with, even where the wife sues *in forma pauperis* — *Ward* v *Ward et al.* 553

Vide Costs 1.

FORGERY.

Vide Practice 5.

FRAUD.

1. A wrong done by a person seeking equitable relief, to one not a party to the proceedings, furnishes no objection to such relief on the part of those against whom it is sought. *Goode* v *Hawkins*, 393
2. When an objection to equitable relief is based upon an allegation of *fraud*, it will not be sustained by proof of mere *error*. *Ibid.* 393
3. No one can in equity, be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition. *Ibid.* 397

Vide Evidence 1, 6—Execution and Execution Sales, 4—Executors and Administrators 41.

GIFT OF SLAVES.

1. Before the act of 1806 (*Rev. c.* 701) if a father, upon the marriage of a child, put negroes into her possession, *prima facie* it is a gift, and not a loan. *Dameron* v *Clay*, 19
2. A parol gift of slaves is not entirely void by the act of 1806, (*Rev. c.* 701.) The death of the donor, or a confirmation of it by him, renders it good *ab initio*. *Bullock* v *Bullock*, 314
3. A gift unaccompanied with delivery, and by an instrument not sealed, is not valid; and where a testator bequeathed a slave to his widow for life, and afterwards to all his children, and while the slave was in the possession of the widow, some of the children relinquished, without consideration, and by a writing not under seal, their interest in the slave to one of their brothers, it was held that the instrument passed nothing. *Downey* v *Smith*, 535

GUARANTY.

The arrest of a debtor, upon final process, is not necessary to enable a guarantee of the debt, to charge the guarantor.—*Blackledge* v *Nelson*, 65

GUARDIAN AND WARD.

Vide Interest, 2.

HEIRS.

The heir is concluded by a judgment against the administrator, as to every thing but the amount of assets received by the latter. *Sanders* v *Sanders*, 264

Vide Accord and Satisfaction,—Legacy, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,—Vendor and Purchaser, 11.

HOTCH POT.

Vide Evidence, 4.

HUSBAND AND WIFE.

1. In this State the wife has no equity against her husband to have a provision made for her out of her *choses* accruing during the coverture, although he be insolvent, and no settlement has been made on her. *Lassiter* v *Dawson*, 383
2. A deed to a *feme covert*, conveying slaves to her after the death of the donor, creates an interest which survives to her after the death of her husband, and she is a necessary party to a bill by him, seeking relief upon her title. *Kornegay* v *Carroway*, 406
3. The words "to her and her heirs' proper use," annexed to a legacy to a married daughter, do not make it a legacy to her separate use, being probably an ineffectual attempt to secure it to her children, and not intended to defeat the right of her husband, and the fact that the testator uses different words in legacies to his sons, is not sufficient to rebut this presumption, and repel the claims of the husband. *Rudisell* v *Watson*, 430

Vide Feme Covert,—Parties to a Suit, 1, —Vendor and Purchaser, 3, 4.

IN FORMA PAUPERIS.

Vide Feme Covert.

INJUNCTIONS.

1. Where the right affected is clear, or the injury irreparable, injunctions are granted against private nuisances, originating in establishments for personal gratification, or private profit only. *Eason* v *Perkins*, 40

2. But private right must, upon adequate compensation, yield to public convenience; and courts of equity will not interfere by injunction, where the public benefits resulting from such an establishment exceed the private inconvenience. *Ibid.* 40

3. A court of equity will not enjoin a suit at law in the court of another State; neither will it direct a particular order to be made in a chancery suit thus pending, unless it be by putting a party to his election. *Boyd* v *Hawkins*, 336

Vide Judgment 6—Mills 1, 2.

INTEREST.

1. Interest upon rents and profits is not usually allowed until an account be demanded. But where the possession is *mala fide*, it is allowed from the receipt. *Benzein* v *Robinet*, 67

2. Interest is not compounded against a guardian for the time when the funds of the ward remain in his hands after the relation has ceased. *Mitchell* v *Robards*, 479

3. An executor will not be charged interest on a small sum, too inconsiderable for distribution, which he *bona fide* keeps on hand for a general settlement. Nor will he be charged interest on a large sum, received after the filing of a bill for an account, when he makes no opposition to the account, and retains the money to answer the decree. But if an order is made in the cause, authorising him to pay the money into court, and he neglects to do so, he will be charged with interest upon it from the time the order was made. *Downey* v Smith, 535

Vide Estate for life in personalty, 3—Executors and Administrators, 26, 41—Legacy 36, 47.

INTERPLEADER, BILL OF.

Vide Jurisdiction 4.

ISSUE.

Vide Answer 5, 6, 7—Practice 5.

JUDGMENT.

1. The irregularity of a judgment at law is no ground of relief in equity. To entitle himself to relief, the defendant at law must show that advantage was taken of him, to preclude him from a defence against an unconscientious claim. *Bissell* v *Bozman*, 154

2. If a judgment has been iniquitously used, a Court of Equity will annul what has been done under it. *Ibid.* 161

3. Where there is a confidential relation between the plaintiff and defendant at law, a Court of Equity will set aside a judgment by default, unless some proof was offered. *Ibid.* 162

4. Where a judgment was confessed to the prosecutor by a prisoner confined in jail on a charge of larceny and arson, under circumstances which induced the court to enjoin it, but without any misconduct on the part of the prosecutor, it was held, that it should stand as a security for the amount which might be recovered in another action to be brought by the prosecutor for the same trespass. *Heath* v *Cobb*, 187

5. A defendant at law has no relief in equity against a void judgment; as where no *sci. fa.* was served on the heir, and the creditor obtained a judgment and purchased his land, the judgment being void, and the remedy at law complete, no relief can be had in equity. *Armsworthy* v [illegible], 224

6. A defendant whose judgment has, pending a suit in equity, become dormant, is not, upon a dismission of the bill, entitled to a decree for his debt, unless an injunction has issued. *Howell* v *Hooks*, 261, 262

Vide Executors and Administrators, 28, 29, 30, 33,—Lapse of Time, 1, 4, 7, 8, 9.

JURISDICTION.

1. Upon a bill by children against the administrator of their father, harging that negroes had been advanced, upon the marriage to their mother, and vested in her husband, and that after the death of their father, the negroes were claimed by the brothers and sisters of the mother, as having been a loan, and not an advancement—there being no collusion between the administrator and the plaintiffs, and the former being in possession, and honestly defending his legal title—

it was held that the court had jurisdiction to decree a distribution of the slaves by the administrator, but not to try the controversy between the latter and those claiming a legal title adversely to him. *Dameron* v *Clay et al.* 17

2. A court of equity has a clear jurisdiction on the bill of the *cestui qui trust*, against the trustee. *Ibid.* 20

3. But where a third person claims a legal title adversely to the trustee, a bill by the *cestui que trust* against the trustee and that third person, drawing the question of title into litigation in equity, cannot be maintained. *Ibid.* 20

4. It cannot be sustained as a bill of interpleader, because the plaintiffs are not in possession. *Ibid.* 21

5. And *it seems* that the trustee cannot to protect himself, draw the *cestui que trust*, and a stranger into litigation.—*Ibid.* 21

6. Nor can one in possession under a legal title, sue one out of possession, to have a pretended title of the latter declared void, unless upon some peculiar ground of equity jurisdiction. *Ibid.* 21

7. Courts of equity in this State will not sustain a bill to enjoin a judgment at law, upon a money demand, where the amount in controversy does not exceed fifty dollars. *Chunn* v *McCarson*, 73

Vide Account 3, 4.—Executors and Administrators 18.

LAND CHARGED WITH THE PAYMENT OF DEBTS.

1. The rule exempting lands charged with the payment of debts, until the personal estate is exhausted, is not founded upon the notion of the testator's providing a fund not otherwise chargeable; but upon his presumed intent that his gift shall not fail while there is a surplus not given away. *Palmer* v *Armstrong*, 269, 270

2. Or to distinguish between different devisees, and not between them and the heir or next of kin. *Ibid.* 270

3. The rule is the same when there is a conversion out and out, and the residue given away. *Ibid.* 271

Vide Legacy, 19, 20, 21, 22, 23, 24, 28, 35, 37.

LAPSE OF TIME.

1. Where a judgment on a bond was obtained, and after a return of not satisfied, became dormant, and ten years afterwards was revived, when the defendant having discovered evidence that the bond had been paid, obtained a verdict establishing that fact, upon an issue directed for the purpose, it was held, RUFFIN, Judge, *dissentiente*, that as the evidence was satisfactory to a jury, the lapse of time was not a bar to the relief. *Hill* v *Jones*, 101

2. *Per* RUFFIN, Judge. A Court of Equity requires active diligence, as well as a just cause, because of the difficulty of ascertaining the truth in State cases.—*Ibid.* 104

3. The rule prescribes no particular time; but where the s atute of limitations bars at law, it bars also in equity. *Ibid.* 105

4. Where the relief is sought against a judgment at law, to let in a legal defence unknown at the trial, the bill should be filed with the least possible delay. *Ibid.* 105

5. This in analogy to the rule of law on applications for continuances for newly discovered testimony. *Ibid.* 106

6. And also where a verdict is sought to be set aside by appeal or *certiorari*.—*Ibid.* 106

7. At any rate the plaintiff should be held, in analogy to the act of 1800 (*Rev. c.* 551) prohibiting the granting of injunctions upon judgments obtained at law, more than four months after the trial to file his bill within that time after the discovery of the evidence. *Ibid.* 106

8. A judgment ought not to be set aside for testimony discovered after the time allowed the defendant to bring error.—*Ibid.* 108

9. Much more ought a bill to set aside a judgment for after discovered testimony, to be dismissed, where if it sought to reverse a decree, it would be barred by lapse of time. *Ibid.* 108

10. A delay of thirty-four years after a contract for the sale of land, without any claim on it, is a bar to a bill for its specific performance, where the delay is not

accounted for by reason of infancy, coverture, or the like. *Tate* v *Conner*, 224

11. In an agreement for the sale of land, the vendor is considered to be a trustee for the vendee, and the statute of limitations does not, in equity, bar the latter. But that court respects the lapse of time in cases of implied trusts, and unless explained, it is a bar to the relief. *Ibid.* 226

LEGACY.

1. Where a testator bequeathed personal estate to a child, "to her and her heirs forever," and added "it is my will and desire that if my said child lives to arrive at the age of eighteen years, for her to receive said legacy and take possession of it; and if she should die without a lawful heir begotten of her body, then the said property to revert back and be equally divided," &c.—it was held that the words "receive and take possession" were equivalent to "shall then be paid," and that the legatee took a vested and (the limitation over being too remote,) an absolute interest. *Cooper* v *Pridgeon*, 98

2. Where the time is not annexed to the legacy, but to the payment of it, the legatee takes a vested interest. *Ibid.* 99

3. Where a testator, having expressed his determination to disinherit one of his children, bequeathed as follows: "my negroes I wish divided equally among my wife, L, N, and D, (his other children) and in case of the death of either, that their share shall be equally divided among the survivors, it was held by HALL, Judge, that the words of survivorship were used solely to effect the testator's purpose of disinheriting one of his children, and that upon his death, the estate vested in the survivors of L, N, and D, and was only divested upon their death without issue, when the share of the child so dying went to the survivors. But by RUFFIN, Judge, held, that the words of survivorship were used only to prevent a lapse; and that at the death of the testator, the estate vested absolutely in the survivors, and upon the death of either without issue, his share went to the next of kin. *Cox et al.* v *Hogg et al.* 131

4. In a bequest to A, and "in case of his death," or "if he happen to die," to B, A is held, according to the circumstances of each case, to take for life, or to take absolutely, and B is only to be substituted in case of a lapse. *Ibid.* 127

5. If A survives the testator, B takes upon the death of A, unless a benefit to A's issue is intended, or unless by the bequest he is to have the principal as well as the profits. *Ibid.* 128

6. Much more is this the case when B is a stranger. *Ibid.* 128

7. Where the share of each legatee was to be determined at the death of the testator, and a division to be made, and there was no trust and direction to pay over the profits, especially where the legacy was of a residue, these are circumstances indicating that words of survivorship are to be restrained to the death of the testator. *Ibid.* 128

8. An express estate in common is not cut down to a joint tenancy by words of survivorship; and they are held to be inserted for the purpose of preventing a lapse. *Ibid.* 128, 129

9. Where a general survivorship is created in a residuary clause, what sort of survivorship is intended, may be ascertained from other parts of the will. *Ibid.* 129

10. A clause of survivorship superadded to words which in a will create a tenancy in common, is held to be inserted for the purpose of preventing a lapse, unless a contrary intention is apparent. Because a different construction would cut off the issue of the legatee. *Ibid.* 131, 132

11. For the same reason a devise to A, but if he die before twenty-one *or* without issue, is construed to mean if he die before twenty-one *and* without issue. *Ibid.* 132

12. But where the issue of the legatee are not injured by a natural construction, it is adopted. *Ibid.* 133

13. Where a testator in his lifetime subscribed for stock in the Roanoke Navigation Company, and died without completing the payments, and by his will

gave specific legacies and created a fund for the payment of his debts, it was held, the fund for the payment of debts and the undisposed of residue being exhausted, that the stock in the hands of the heir should be subjected to the payment of the balance due upon the subscription in exoneration of a specific legacy. *Rebards v Wortham*, 173

14. Descended lands must exonerate a specific legatee from the payment of all debts, for which the heir is bound.—*Ibid.* 175

15. The devisor cannot restrain the creditor from subjecting the personal estate; but where the latter has a right to resort to both the personal and real assets and exhausts the former, a legatee will be substituted to the rights of the creditor against the heir. *Ibid.* 176

16. If the heir pay the specialty debt of the ancestor, he may indemnify himself out of the residue of the personal property. But the legatee cannot be indemnified out of the real estate, unless the debt paid by his legacy be a charge upon the heir. *Ibid.* 176

17. And a subscription to the stock of the Navigation Company being a simple contract debt, the legatee on payment of it, has no right to indemnity from the real estate. *Ibid.* 176

18. But the subscription creating a specific lien, and being the ancestor's debt, the heir has a right to an indemnity from the residue, and a specific legatee from the real estate. *Ibid.* 177

19. Where land is devised to be sold for the payment of debts, and the surplus given away as cash, it is primarily liable, even between the heir and the residuary legatee. *Ibid.* 177

20. But where land is charged with the debts, it is taken as only auxiliary to the personal estate, unless the contrary clearly appears to have been the intention of the testator. *Ibid.* 177

21. Real assets in the hands of the heir, as well as personal estate are the primary funds for the payment of specialty creditors and specific liens; and by specially bequeathing the personal estate, the testator declares his intention that the land shall bear its own burden. *Ibid.* 179

22. So by a devise of the land, the testator declares his intention to exempt it, and hence a devise to the heir prevents the land from being subjected in exoneration of the specific legacies. *Ibid.* 179

23. It is a question of intent; but to change the order of liability requires a clear expression to that effect. *Ibid.* 179

24. And where the testator devised land to be sold for the payment of debts, and gave the surplus to his wife, and also gave her a large legacy and small legacies to others, and directed his executors in case of a deficiency of the fund for the payment of debts to sell such property as his wife might point out, *it was held* that this direction charged the wife's legacy as between her and the other legatees, but did not exonerate descended real estate. *Ibid.* 179–180

25. Where a testator directed the interest of one third of the valuation of his slaves to be paid to his son, and requested another son to take the slaves, and pay the valuation to his executors, and appointed that son & another his executors: Held, upon the probate of the will by the son alone, and upon his electing to take the negroes under the will, that he might retain the value of the negroes, and that they were not bound as a security for the annuity. *Wilson v Wilson*, 181

26. Bequest of negroes, to be divided between the children of A, when one of them arrives at the age of sixteen; held, that children born after the death of the testator, but before the time of the division, are entitled to a share. *Fleetwood v Fleetwood*, 223

27. A legacy to a class of persons, without any time fixed for its division, is to be divided among the legatees in *esse*, at the testator's death. *Ibid.* 222

28. A testator gave lands and goods to his executors to be sold, "and after payment of all my just debts, the residue of the moneys arising from them, to" &c. The words "after payment," &c. subject the land in exoneration of other legacies, but not in favor of the next of

kin. *Palmer* v *Armstrong*, 268
29. A pecuniary legacy charged with the debt of the testator, is to be reimbursed out of the residuum, as well when that is undisposed of, as when it is given away. *Ibid.* 271
30. A legacy, where the legatee is not described so as to take, sinks into the residue; but one given by a description which applies to several, goes to the sovereign as direlict. *Clarke* v *Cotten et al.* 301
31. A legacy to a daughter of "the negroes I placed in her possession at her marriage," passes the increase, as well as the original stock. *Bullock* v *Bullock*, 314
32. A legacy of stock in trade, and all purchases made therewith, gives the legatee the profits thereon. *Ibid.* 315
33. A legacy to the heirs of a living person is to be construed as to his children, if it appears upon the will that he is living. *Ibid.* 316
34. And in that case, after-born children take under the words heirs proceeding from his body. *Ibid.* 316
35. A direction to sell specific property, "and the money thence arising to be disposed of" in the payment of debts and legacies, makes the latter a charge upon the sales. *Fraser* v *Alexander*, 352
36. A legacy to a grandchild, "when she comes of age," and "if she dies before she arrives at lawful age or marries," then over, is contingent, and vests only upon her arrival at full age or marriage. But the payment is postponed until she comes of age, and interest accrues only from that time. *Kent* v *Watson*, 366
37. A legacy "to be paid out of my estate," is charged by those words upon the land which passed by the will, especially when the personalty is very small, and was all given to the wife for life, and she appointed executrix. *Bray* v *Lamb*, 372
38. A bequest of "all the notes of hand, that will be remaining after paying off all the legacies herein-before given, which I suppose will be from twenty to thirty thousand dollars," is specific, and the legacy is to be applied to the payment of the general legacies, only in the event of the undisposed of residue being insufficient for their discharge. *Perry* v *Maxwell*, 488
39. Dividends upon stock due at the death of the testator, do not pass by a bequest of the stock itself. *Ibid.* 495
40. A legacy by a debtor to his creditor, of the same nature with the debt, and of an equal or greater value is *prima facie* a payment of it. *Ibid.* 498
41. But the adoption of this rule has been regretted, and there are many circumstances which repel the presumption.—As a general direction for the payment of debts, or if the legacy be contingent, or payable after the debt, or be specific or uncertain, or given after the debt is contracted. Especially is it repelled, where the debt is contingent. *Ibid.* 498-499
42. And where at the date of his will the testator was an administrator, and upon his death without settling his administration, bound to account with an administrator, *de bonis non*, legacies given by him to the next of kin of his intestate, are not payments of their distributive shares. *Ibid.* 501
43. A legacy "in notes to be taken out of my notes, and handed over," &c. is not merely a charge for its amount upon the notes of which the testator may be possessed, but is a specific legacy of securities hereafter to be ascertained. *Ibid.* 501
44. But one to be paid as soon as its amount can be collected, or if the "legatee is willing to receive that in good notes, he can do so," is a general legacy. *Ibid.* 503
45. So also, is a legacy "in notes to be paid as soon after my death, &c." there being nothing to denote that any particular notes were intended. *Ibid.* 504
46. And a subsequent bequest of "all the notes that will be remaining after paying off the legacies herein before given," will not make them specific, because the remainder being uncertain in amount, indicates that the charge upon them, and not a fractional part of them, was intend-

ed. *Ibid.* 505
47. A gift by will, of a note, carries with it the interest due on it. *Ibid.* 507
48. A legacy to A, *when* he shall attain twenty-one, does not vest before that time, and a payment to his guardian during his infancy, does not protect the executor. *Giles* v *Franke*, 521
Vide Devise, *passim*,—Estate for Life in Personalty, *passim*,—Executors and Administrators, 3, 18, 21, 23, 41, 43,—Husband and Wife, 3,—Residue and Residuary Clause, 1, 2,—Tenant in Common, 2,—Will, *passim*.

LIMITATIONS OF PERSONAL ESTATE.

In remote limitations of personal estate, the first taker is not to secure the forthcoming of the property to answer the ulterior limitations, unless he be insolvent. *Bullock* v *Bullock*, 321

LIMITATIONS, STATUTE OF.

Vide Lapse of Time, 3, 7, 11,—Tenant in Common, 1,—Trust, 17.

MASTER OF A SHIP.

1. For the benefit of trade, the captain of a ship is liable for disbursements in a strange port; but if he consigns to the person making them, property of the owner sufficient to cover them, the consignee, by paying the funds in his hands to the owner, without deducting the disbursements, discharges him. *Bissell* v *Bozman*, 229
2. The captain is liable as the surety of the owner, and has, as to him, all the rights of one. *Ibid.* 232
3. The captain, when discharged from liability to the consignee, cannot affect the relations subsisting between him and the owner; neither by a subsequent payment to the former, can he make the latter his own debtor. *Ibid.* 232

MASTER'S REPORT.

1. If a written statement, not on oath, of matters relevant to an enquiry before the master, be received and acted upon by him, the admissibility of such statement cannot be made the ground of exception to his report, unless the objection was taken before the master. *Aliter* where the master receives a written statement of matters, which if sworn to, would not have been admissible, because irrelevant without the production of a judgment or other record. *Finch* v *Ragland*, 137
2. Written receipts for money of living persons are not strictly legal evidence of disbursements by an administrator, especially where the money paid is due by account. But if such receipts be received and acted on by the master, without objection made before him, the exception cannot afterwards be taken.—*Ibid.* 139

MILLS.

1. Where the owner of land adjoining an old mill site, sought to enjoin the erection of a new mill, and it was ascertained by a verdict, that the mill, though injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused, especially as the old mill was erected before the plaintiff purchased. *Eason* v *Perkins*, 38
2. The erection of mills, where they are not nuisances, being authorised by law, a Court of Equity will not restrain the erection of one, simply because it affects the health of one family. *Ibid.* 41

MISTAKE.

Where a deed describes the land conveyed by metes and bounds and by mutual mistake of the parties, covers land which the vendor did not intend to sell, nor the vendee to buy, the mistake will be corrected. *Pugh* v *Brittain*, 34

MORTGAGE.

1. Upon a bill of foreclosure, a sale of the mortgaged premises is directed. *Blackledge* v *Nelson*, 66
2. Where a part of the mortgaged premises was sold by the mortgagor subsequent to the mortgage, a sale of the residue of the land will be ordered in the first instance, for the payment of the mortgage debt. *Ibid.* 66
3. Where the bill alledges a transaction to be loan and a mortgage, and seeks a foreclosure, the plaintiff cannot at the hearing ask relief, as upon a conditional sale. *McBrayer* v *Roberts*, 78
4. On the enquiry whether a conveyance

of slaves be a mortgage or a conditional sale, the fact that no bond is taken to secure the money advanced, is only one evidence of the character of the transaction. *Ibid.* 78

5. If the mortgagee obtains a judgment and execution for the mortgage debt, and under the act of 1812, (*Rev. c.* 830,) sells the equity of redemption, and becomes the purchaser, how is the relation between him and the mortgagor affected thereby. Qu. *Bissell* v *Bozman*, 165

6. But where a mortgagee purchased at a sheriff's sale, and filed a bill to have his title confirmed, held that he thereby consented to open the estate to redemption. *Ibid.* 166

7. If after foreclosure, the mortgagee in any other way treats the debt as still due, the account will be opened. *Ibid.* 166

8. A mortgagee who sells without a foreclosure is responsible for the value of the property sold. *Bissell* v *Bozman*, 234

9. A memorandum given by the bargainee at the time of receiving an absolute deed, whereby he stipulated that if the land was sold within two years, he would refund to the bargainor the excess received over the purchase money and interest, together with the costs of repair, unexplained, and without evidence to the contrary, makes the deed a mortgage. *Gillis* v *Martin*, 470

10. An agreement at the execution of a mortgage, that in default of the debtor it should become absolute, is never a bar to redemption. *Ibid.* 475

11. A mortgagee in possession is entitled to the costs of repairs and interest thereon. *Ibid.* 475

12. But generally it is otherwise as to improvements, because by allowing for their cost, the difficulty of redemption is increased. *Ibid.* 475

13. But where the mortgagee, thinking himself to be the owner, *bona fide* makes improvements which exhaust the rent, he is allowed for their cost. *Ibid.* 475

14. Upon a bill for redemption, a sale is never ordered, unless by consent. It is otherwise when a foreclosure is sought. *Ibid.* 477

15. A mortgagee who purchases the mortgaged premises at sheriff's sale, upon a parol agreement to hold them as a security, is, in equity, a mere incumbrancer, and parol evidence of the agreement may be received, notwithstanding the sheriff's deed be absolute. *Jackson* v *Blount*, 555

16. Facts and circumstances *dehors* an absolute deed, may, in equity, be proved to show that it was executed merely as a security. *Ibid.* 557

17. An absolute deed declared to be subject to a *proviso* for redemption, upon proof that the vendor was an ignorant and impoverished man—was the father-in-law of the vendee—had been in treaty with the latter to raise money upon loan—that the purchase was an unequal one—and was the balance which the vendor owed for the same land—together with the fact that he occupied the land for twenty-four years without paying rent—and other attendant circumstances.—*Kimbrough* v *Smith*, 558

18. Absolute deeds taken from embarrassed [illegible] for a loan, are viewed with distrust by Courts of Equity. *Ibid.* 563

Vide Usury.

MULTIFARIOUS.

Vide Bill.

NUISANCES.

Vide Injunction, 1, 2.

PAROL EVIDENCE.

Vide Evidence, 1, 4, 5, 6.

PARTIES TO A SUIT.

1. The wife is an unnecessary party to a bill to set aside a deed for her land, fraudulently procured from her husband alone. *Brownrigg* v *Pratt*, 48

2. Arbitrators, officers of corporations, and solicitors, who have aided their clients to commit frauds, may be made defendants. But the rule is different as to a mere witness, who has no interest in the cause, and against whom no relief can be given. If he answers, the bill, at the hearing, will be dismissed as to

him with costs. *Reeves* v *Adams et al.* 192

Vide Husband and Wife, 2,—Partnership 1, 8, 9.

PARTNERSHIP.

1. All the members of a partnership are necessary parties to a final settlement of the partnership accounts; and if after such settlement one leaves his share in the hands of the acting partner, he does so at his own risk. But if pending an account, and before its settlement, one of the partners receives his share of the profits without the consent of the others, upon the insolvency of the acting partner, he must account with the others for the amount thus received. *Allison* v *Davidson*, 79
2. After the dissolution of a partnership, each partner is a trustee for the others, as to the partnership funds in his hands. But if one of them pays over to the acting partner the partnership effects, unless *mala fides* be proved, he is not liable upon the insolvency of the latter. *Ibid.* 84
3. If several partners conspire to defraud their copartner out of his share of the profits, and act with a view to that purpose, it seems that each is liable for the balance due such copartner, on an adjustment of the partnership accounts.—*Ibid.* 86
4. A partner who has received none of the profits, must first exhaust the partnership effects existing in specie, before he can compel contribution from a partner who has received his share. *Ibid.* 87
5. Where of four partners, one died insolvent, largely indebted to the partnership, and two others, without the consent of the fourth, received their shares from his executor, the sum so received, remains as between the survivor's joint stock. *Ibid.* 87
6. When an acting partner dies insolvent, having appointed one of his copartner's executor, who retains his profits as a debt due from the testator, he is bound to account with the other partners for the sum retained. *Ibid.* 88
7. Where an acting partner takes bonds payable to himself, for partnership debts, and dies, in equity these bonds are copartnership effects. *Ibid.* 89
8. An assignment by one of two copartners, of his interest in the copartnership, is a dissolution of it, because the other is not bound to receive the assignee as a partner. But where the assignment was a mere security, and it was agreed by all parties that the assignor should act in the partnership business as agent of the assignee, it does not produce this effect. And upon a bill by the assignor for an account of the partnership, the assignee and the other partner, are proper parties. *Bufort* v *Neely*, 481
9. The principal debtor is not a necessary party to a bill to settle a copartnership, where the plaintiff has assigned his interest in it to indemnify the surety.—*Ibid.* 485
10. A sale of the joint effects in lots, made by one partner, and a purchase by him, does not divest the property of the other, and the latter is entitled to an account of the profits thereof. *Ibid.* 486

Vide Costs, 4.—Trust 27.

PLEADING.

1. Where a deed is pleaded, or only stated in the answer, as a bar to the relief without having been mentioned in the bill, the replication puts only its execution in issue, and it cannot be impeached by proof of collateral facts. *Boyd* v *Hawkins*, 215, 216
2. But it is otherwise where the deed, with all its attending circumstances, is set forth in the answer, and is made the foundation of a charge against the plaintiff. *Ibid.* 216
3. At the hearing, a deed thus brought forward is not decreed to be cancelled, because relief of that kind is not sought, not because it was not in issue. *Ibid.* 217
4. A plea of the act of 1819 (*Rev.* c. 1016) avoiding parol contracts for the sale of land, is bad where the plaintiff does not pray a specific performance, but treats the contract as a nullity, and seeks other relief. *Clancy* v *Craine*, 363
5. A demurrer is bad, which does not spe-

cify the parts of the bill to which it is intended to apply. More especially is it bad, when it is expressed to be "to the residue of the bill not pleaded to," when in fact the plea applies to the bill. *Ibid.* 363

Vide Release.

POWER.

1. Where a testator directed his land to be sold, and the proceeds divided among his children, the power being apparently executed, and the purchase money paid to the children, they will not be permitted to recover in ejectment, because the will was not proved so as to pass the land.—*Sanderlin v Thompson*, 539
2. But if the purchaser, after the filing of his bill for relief, procures the will to be proved, and charges this fact by a supplemental bill, he thereby overrules his original equity; because having established a legal title in himself, he defeats the jurisdiction of the court. *Ibid.* 539
3. There is no equity in favor of the grantee of a power, nor of a purchaser under him, against the heir, to supply a defect in the creation of the power. But it is otherwise as to the purchaser, upon a defective execution of it. *Ibid.* 545

PRACTICE.

1. Proofs which are not material to any issue between the parties cannot be read upon the hearing. *Brownrigg* v *Pratt*, 49
2. Where the answer sets up a release as a defence to the matter stated in the bill, and the plaintiff replies generally, he cannot at the hearing read testimony impeaching the release as fraudulent—*Wilson v Wilson*, 186
3. No interrogatories can be put to witnesses, which do not relate to some fact in issue between the parties; and testimony as to facts not stated in the bill or answer is to be rejected. *Ibid.* 186
4. A party having filed exceptions, will not be permitted to extend them, unless originally prevented from completing them by accident or surprise. *Potts* v *Trotter*, 283
5. Upon a bill to set aside a deed as a forgery, the deed being in the custody of the court, and no doubt being entertained of its being forged, yet as the fact was more properly triable at law, an issue was ordered at the election of the defendant. *Cooper* v *Cooper*, 298
6. As a plaintiff may in this State dismiss his bill without prejudice, the order for hearing, will upon his application, be set aside upon the terms of his paying all the costs, without being reimbursed them in any event. *Springs* v *Wilson*, 385
7. Upon a bill by the next of kin, if his character does not conclusively appear, a reference as to that fact will be directed. *Redmond* v *Coffin*, 446

Vide Answer 2.

PRINCIPAL AND ATTORNEY.

An attorney must act in the name of his principal, and a deed executed by him in his own name, and as his proper act, does not bind the principal. *Redmond* v *Coffin*, 441

RECEIPT.

A receipt not under seal, is only evidence of satisfaction and may be explained by parol testimony. *Chunn* v *McCarson*, 74

REFERENCE TO THE CLERK AND MASTER.

1. Upon a reference of an account to the clerk, he has power to determine whether a slave was the property of the testator or the executor. *Arnold* v *Blackwell*, 1
2. A master cannot act upon facts within his own knowledge. *Bissell* v *Bozman*, 234

Vide Costs, 3,—Practice, 7.

RELEASE.

An instrument, in its terms a release, but not under seal, cannot be pleaded as a bar. *Redmond* v *Coffin*, 441

Vide Practice, 2,

RELIEF.

1. If the specific relief prayed cannot be given, proper relief may be had under the general prayer, but this relief must be consistent with the frame of the bill: and where the plaintiff claimed slaves as absolute owner, and upon the proofs it appeared that he was entitled in re-

mainder, after an interest for life of the defendant, the plaintiff cannot abandon his prayer for relief as owner, and obtain security as a remainderman.—*Kornegay* v *Carroway*, 403

2. One who has the legal title cannot maintain a bill to have an equitable claim upon his estate declared unfounded. *Sanderlin* v *Thompson*, 546

RENTS AND PROFITS.

Vide Interest, 1.

RESIDUE AND RESIDUARY CLAUSE.

1. A testator is presumed not to die intestate as to any part of his estate; and hence, where there is a residuary clause, all his property not specifically bequeathed, passes under it. *Speight* v *Gatling*, 5

2. A bequest of the residue "to be disposed of as my executors think proper," is a gift to them for their own use, and since the act of 1789 (*Rev. c.* 308,) making executors trustees of the residue, it is a question of construction, and parol evidence is not admissible to prove the next of kin entitled. *Ralston* v *Telfair*, 255

Vide Estate for Life in Personalty, 1,—Legacy, 29, 30, 38.

SET-OFF.

1. Promissory notes executed by the plaintiff, and payable to persons not parties, cannot be set-off against the amount reported in his favor. *Benzein* v *Robinett*, 69

2. If payable to a defendant, and the plaintiff is insolvent, they may be set-off upon petition. *Ibid.* 69

3. But if not payable to a party, it can only be done by a bill. *Ibid.* 69

4. Mutual debts only can be set-off in equity as well as at law; and where A, as administrator, had a judgment against B, who had in C's name, recovered one against A, in his own right, and being insolvent, had assigned it to a creditor, A cannot have the latter judgment applied in satisfaction of the former. *Sellers* v *Bryan et al.* 358

5. In equity, a debt due husband and wife cannot be set-off against one due by the husband alone *Ibid.* 361

SHERIFF'S RETURN AND DEED.

Vide Evidence, 2.

SLAVES.

Vide Emancipation,—Estate for Life in Personalty, 2,—Gift of Slaves, 1, 2, 3.

SPECIFIC EXECUTION.

A contract fairly made, but under a misapprehension of its terms, and of the price, will not be specifically executed, unless the defendant by his subsequent act, has ratified it, and thereby made it unconscientious in him to refuse its fulfilment. *Arnold* v *Arnold*, 467

STATUTES COMMENTED UPON, OR REFERRED TO.

1715, Rev. c. 2, § 5, Wagstaff v Smith, 264
1741, Rev. c. 28, McBrayer v Roberts, 75
1777, Rev. c. 122, Eason v Perkins, 38
1784, Rev. c. 204, Craven v Craven, 339
1789, Rev. c. 308, Ralston v Telfair, 255
1791, Rev. c. 351, Craven v Craven, 339
1799, Rev. c. 536, Clarke v Blount, 51
" " " " Boyd v Hawkins, 334
1799, Rev. c. 538, McPherson v Hussey, 323
1800, Rev. c. 551, Hill v Jones, 108
1806, Rev. c. 702, Dameron v Clay, 17
" " " " Bullock v Bullock, 314
1808, Rev. c. 759, Nunn v [illegible] 383
1812, Rev. c. 830, Morris v Ford, 418
1817, Rev. c. 959b Robards v Wortham, 192
1818, Rev. c. 962, Pike v Armstead, 24
" " " " Littlejohn v Williams.
1819, Rev. c. 1016 Clancy v Craine, 363
1820, Rev. c. 1055 Freeman v Perry, 243
1822, Private Act c. 98. Free Bridge Company v Woodfin, 113

STATUTE OF FRAUDS.

Vide Contract for the Sale of Land, 1, 2.

STOCK IN THE ROANOKE NAVIGATION COMPANY.

Vide Legacy, 13, 17, 18.

SURETY.

1. If a creditor be bound to sue the principal at the request of a surety, his refusal does not discharge the surety, if no injury results to the latter—as where the principal debtor was insolvent, when the

liability of the surety was incurred.—*Bizzell* v *Smith*, 27
2. *It seems*, that the creditor is not bound to sue the principal debtor at the request of the surety. *Ibid.* 28
3. Upon the insolvency of the principal debtor, a surety is considered in equity as a creditor, and may retain, against an assignee for value and without notice, any funds of the principal which he has in his hands. *Battle* v *Hart*, 31
4. Where a testator died indebted to a bank, and his note was renewed by his executor, as executor, and afterwards discharged by a surety who became liable subsequently to the death of the testator, it was held that the surety had a right to be substituted to the claim of the executor and the bank against the assets; and the executor being in advance to the estate, by reason of the debt which the surety had paid, that balance was decreed to be paid to the latter in preference to a subsequent assignee of the executor. *Hart* v *Bryan*, 147
5. A deed obtained by securities for their indemnity, under a threat of legal process in case of refusal, cannot be set aside by the bargainor for duress in its execution. *Hunt* v *Bass*, 292

SURVIVORSHIP.

Vide Devise, 5, 6, Legacy, 2, 4, 5, 6, 7, 8, 9, 10.

TENANT IN COMMON.

1. A tenant in common, in possession, is not protected by the statute of limitations from an account to his co-tenant of the rents and profits, until three years after a partition. *Wagstaff* v *Smith*, 264
2. Upon a bequest to children, as tenants in common, with a postponement of the division, in the absence of any direction to the contrary, the expenses of each is a separate charge upon his share of the profits. *Green* v *Cook et al.* 531

Vide Legacy, 8.

TRUST.

1. Where one who had become surety for an insolvent person, was, in order to obtain forbearance, compelled to convey his estate as a security for the debt, to a trustee nominated by the creditor, who also became assignee of the effects of the principal debtor, to secure the surety, *it was held*, that a subsequent agreement, whereby the surety gave the trustee one fourth of the estate of the principal debtor, as a compensation for managing it, was invalid. *Boyd* v *Hawkins*, 195
2. To prevent fraud, Courts of Equity do not permit trustees to purchase the trust estate at their own sales. *Ibid.* 207
3. The rule also forbids a trustee from purchasing for his own benefit, an incumbrance on the trust estate. *Ibid.* 207
4. And it extends to all persons standing in a fiduciary relation to the trustee. *Ibid.* 208
5. Bargains between trustee and *cestui que trust* are not void—but they are viewed with great jealousy. *Ibid.* 208
6. If they result from the connexion, they cannot be sustained. *Ibid.* 208
7. If a sale by *cestui que trust* to the trustee be the effect of the unbiassed judgment of the former, it must appear how this judgment was produced, and whether by pecuniary distress of which the trustee availed himself. *Ibid.* 209
8. A sale by the *cestui que trust* to the trustee, made while the connexion existed, the consideration of which was a discharge of duty by the trustee, cannot be supported. *Ibid.* 210
9. Especially where the trustee was one for sale, imposed upon the *cestui que trust* by his creditor, having all the influence of the latter. *Ibid.* 210
10. And where the *cestui que trust* was ignorant of the value of the estate sold, in distress, and confided in the friendship of the trustee. *Ibid.* 211
11. In this State, trustees are entitled to nothing but their expenses. *Ibid.* 211
12. A stipulation for compensation, made when the relation was contracted, will be supported, unless the trustee be one for sale, nominated by the creditor.—*Ibid.* 212
13. If subsequently arranged, it is only evidence that gratuitous services were not intended, and will not be regarded as a measure for its allowance. *Ibid.* 212

14. The purchase by a trustee of an incumbrance upon the trust estate, enures to the benefit of *cestui que trust*, and a sale of one fourth of the estate in consideration that the trustee will surrender the judgment, is made by *cestui que trust*, in ignorance of his right. *Ibid.* 213

15. And such a sale made, when the *cestui que trust* was in pecuniary distress, fearful of the sinister influence of the trustee, and under mistaken estimates of his services, cannot be supported. *Ibid.* 215

16. And a subsequent deed will not help it, unless the *cestui que trust* knew that the first was invalid, and intended the second as a confirmation. *Ibid.* 215

17. Where the property of a female was conveyed to trustees upon trust to permit her intended husband to receive the profits during his life, and then in trust for the wife and the issue of the marriage, a purchaser of a slave, part of the trust estate, under an execution against the husband, with notice of the articles, who held possession adversely to the trustees, more than three years during the life of the husband, and who to a bill filed by the wife and children within three years after his death, pleaded the statute of limitations, was held by DANIEL, Judge, to be a trustee for the plaintiffs, although he acquired nothing by the sale, as the plaintiffs were not guilty of any laches, and had a specific right to the slave. By HENDERSON, C. J. to stand in the place of the husband, and being a privy in estate, to be effected with the trust declared in the settlement. *Freeman et al.* v *Perry*, 243

18. A trustee who is obliged to employ an agent, and does so in good faith, is not responsible for any loss to the trust fund, arising from the subsequent insolvency of the agent. *Potts* v *Trotter*, 281

19. Property conveyed to a trustee for sale, and sold by him under an agreement with the vendee, to be jointly interested in the purchase, is subject to the original trust. *Hunt* v *Bass*, 295

20. A trustee for sale should be indifferent between the debtor and creditor and should not sell in disregard of the interest of the former, unless it was so agreed. *Ibid.* 296, 297

21. If a title of some of the trust property is disputed, he should not sell it until the rest is exhausted. *Ibid.* 297

22. And the debtor has a right to the trust property which has been improperly sold by him, and which afterwards comes to his hands, or those of his confederates, even if originally sold to one against whom he has no right to relief. *Ibid.* 297

23. Agreements between trustees and *cestui que trusts* are not void, but voidable, and *prima facie* require evidence of collateral facts to support them; and where a trustee had taken an assignment of a judgment which was a lien upon the trust estate, and he and the *cestui que trust* believing it could be used for his pecuniary advantage, agreed that it should be held for the benefit of the latter, and in consideration thereof, and as a compensation for his trouble, the former was allowed one fourth of the trust estate; it was held that the agreement being entered into by the *cestui que trust* under a mistake of his rights, was void. *Boyd* v *Hawkins*, 299

24. Bargains between trustees and *cestui que trusts* must be such as a prudent man would make, and which the former might conscientiously advise the latter to accept from a stranger. *Ibid.* 331

25. In England it is clear that trustees who are *quasi* officers of the law, as executors, &c. have no right to compensation, and by analogy the rule is extended to trustees by compact. *Ibid.* 334

26. But here by the act of 1799, (*Rev. c.* 596,) a different rule has been introduced as to executors, &c. And as equity follows the law, the rule as to trustees by compact is also altered. *Ibid.* 334–335

27. A *cestui que trust* has a right to relief in equity, when the trustee either refuses or neglects to assert his right at law. As where a partnership debt was

assigned to a deceased partner, and the residence of the survivor was unknown, so that a warrant of attorney to sue at law, could not be obtained, it was held that the executor of the deceased partner could recover the debt in equity.—*Drake* v *Blount*, 353

28. A partial payment by a trustee to his *cestui que trust* cannot under any circumstances, operate as a discharge of the residue. *Redmond* v *Coffin*, 442

Vide Execution and Execution sales, 3, 5. Executors and Administrators, 31, 37. Jurisdiction, 2, 3, 5—Lapse of time, 11, Vendor and Purchaser, 7, 8, 9.

USURY.

A Court of Equity is bound by the statute of usury, and although upon the bill of the borrower, aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose an usurious mortgage will be dismissed. *McBrayer* v *Reberts*, 75

VENDOR AND PURCHASER.

1. A vendor may complete his title, pending a suit to rescind the contract for defect of title, at any time before the hearing. *Clanton* v *Burges*, 13

2. It seems that a purchaser who has given a bond for the purchase money, and is in the undisturbed possession, will not be relieved against the bond on the ground of a defective title, there being no allegation of fraud in the sale. *Ibid.* 15

3. Where the land of the wife was conveyed by the husband to her separate use during life, remainder to the issue of the marriage—upon an executory contract by husband and wife, for a sale, a specific performance will not be decreed. *Ibid.* 16

4. But if the sale be executed, so minute an outstanding interest as the trust in favor of the children, depending upon the courtesy of the husband, will not vacate the contract. *Ibid.* 16

5. Where the vendee has taken his title, the court will not rescind the contract, because of a prior voluntary conveyance by the vendor, which is void against the vendee. *Ibid.* 16

6. Where executors having a power to sell lands, honestly made an arrangement with the widow of the testator to waive her right to dower, and sold with notice to the purchaser of the widow's claim—*held* that the latter was entitled to no relief, upon the widow's interposing her claim. *Wilson* v *White*, 29

7. A *bona fide* purchaser from a trustee, holding upon a personal confidence to sell the trust estate, receive the purchase money, and divide it among the *cestuis que trust*, is not bound to see to its application. *Hunt et al.* v *State Bank*, 60

8. A *bona fide* vendee, who has notice that there is a personal confidence between the trustee and *cestuis que trust*, to sell and divide the purchase money, is not affected by equities subsisting between the latter. *Ibid.* 64

9. And especially he is not bound to notice the right of the *cestuis que trust*, to portions of the purchase money, where their amount is disputed. *Ibid.* 64

10. A purchaser cannot call for the execution of a contract procured from a vendor while in a state of intoxication.—*Whitesides* v *Greenlee*, 152

11. The purchase money paid upon an agreement for the sale of land is, in equity, considered as land, and if the contract is vacated after the death of the vendee, it goes to the heir. *Tate* v *Conner*, 226

12. The Cape Fear Navigation Company having laid out a town and sold the lots, under the impression that they would open the navigation to it, and it turning out that the funds of the Company would not admit of it, whereby the lots were rendered worthless; but the Company having made no fraudulent concealment or representation of their means, they and the vendees being under an honest mistake—it was held that the latter could not be relieved. *Turner* v *Cape Fear Navigation Company*, 238

Vide Contract for the Sale of Land, 3,—Exchange,—Mistake,—Specific Execution.

WIDOW.

1. A widow whose husband made a provision for her out of his personal estate, is not entitled to dower, unless she dissent from the will within six months.—*Craven* v *Craven*, 338
2. The case of *Miller* v *Chambers* (manuscript) stated by GASTON, J. to establish that a widow is entitled to dower when her husband makes no provision for her, although she may not have entered her dissent from the will. *Ibid.* 342
3. A widow is entitled to a provision from both the real and personal estate of her husband, and however liberally he may have provided for her out of one, she may, by entering her dissent to his will, obtain her legal provision out of the other. *Ibid.* 343
4. Dower assigned to a widow, who dissents from her husband's will, is neither subject to debts nor legacies. *Bray* v *Lamb*, 374

WILL.

1. Upon the construction of a will reciting an intention to dispose "of what worldly estate," &c. and directing "that all my property consisting of lands, stock of every kind, household and kitchen furniture, wagons, farming tools," should be sold at public sale, and disposing of the same; and in another clause, directing the sale of slaves, but making no disposition of the proceeds—it was held that the words "*all my property*" were qualified by the words "*consisting of*," and restrained to the enumerated subjects, and that the sales of the slaves went to the next of kin. *Fraser* v *Alexander*, 348
2. Can a mistake in drafting a will, appearing either upon proofs or the answer of the next of kin, be corrected. Qu! *Ibid.* 349
3. The obvious meaning of words used by a testator may be controlled by a natural implication arising from the circumstances under which the will was made, or the absurdities resulting from a strict construction. As where a testator disposed of all his estate, giving the larger portion to his wife, and a smaller to a daughter, then his only child, and upon the birth of a son, by a codicil declared "I revoke and make void the said legacy to my wife," and then gave one moiety of it to his son, and made no disposition of the other—it was held that his intention was to revoke the legacy to his wife only for one half, so as to make her a joint tenant with his son. *Jones* v *Jones*, 397
4. A codicil by which the testator intended to revoke a former, and make a new disposition of property, is not effectual as a revocation, unless it be effectual as to the new disposition of the same property. *Ibid.* 398
5. In a will, the words "all ... include bonds as well as notes, but not judgments upon either. *Perry* v *Jarwell*, 406

Vide Accounts,—Legacy, *passim*.—Power, 1, 2.

WITNESS.

Vide Evidence, 3,—Parties to a Suit, 2.